79-781

Supreme Court, U. S.
FILED
NOV 16 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79—

OSGOOD D. HAMLIN, PETITIONER,

versus

F. GREGORIE & SON, ESTHER GREGORIE, MARY ALLSTON GREGORIE, SARAH GREGORIE MILLER, FERDINAND GREGORIE, JR., ELIZABETH GREGORIE PENNERWILL, ANN GREGORIE GREENE, JULIAN WEAVER GRAY, ESTHER ROYALL GRAY SWAIN, SARAH WINDON GRAY MILLS, AND JOHN EVERETT GRAY, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

FRED G. SCOTT, JR.,
Post Office Box 70025,
North Charleston, S. C. 29405,
Attorney for the Petitioner.

Of Counsel:
JACK WHITE,
129 Meeting Street,
Charleston, S. C. 29401.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Question Presented 2

Constitutional Provision Involved 2

Statement of the Case 3

Reason for Granting the Writ:

The Supreme Court of South Carolina, when it adopted verbatim an Order of a lower court as its opinion, changed the law of summary judgment in South Carolina into a procedure permitting a lower court of original jurisdiction to circumvent a hearing of genuine issues at trial, thereby depriving the Petitioner and potentially any litigating parties in South Carolina of their property without due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States 7

Conclusion 11

Appendix:

A. Opinion of the South Carolina Supreme Court in which the opinion of the lower court has been adopted verbatim A-1

Dissenting Opinion of Associate Justice Ness .. A-19

B. Rule 44 of the Rules of Practice of the Circuit Courts of South Carolina A-20

TABLE OF CITATIONS

Cases

	PAGE
Crescent Co. of Spartanburg, Inc. v. Insurance Company of North America, 225 S. E. 2d 656, 266 S. C. 598 (1976)	5, 8, 10
Britton v. Amos, 128 S. E. 2d 161, 241 S. C. 336 (1962)	6
Brinkerhoff-Farris Trust & Savings Company v. Hill, 281 U. S. 673 (1930)	6, 8
State of Missouri ex rel. Missouri Insurance Company v. Gehner, 281 U. S. 313 (1930)	8
Tidal Oil Company v. Flannagan, 263 U. S. 444 (1924)	9
Twining v. New Jersey, 211 U. S. 78 (1908)	9, 10
Bell Telephone Company of Pennsylvania v. Pennsylvania Public Utility Commission, 309 U. S. 30 (1940)	9, 10
Jones v. Buffalo Creek Coal Company, 245 U. S. 328 (1917)	9, 10
Standard Oil Company v. Missouri, 224 U. S. 270 (1912)	9, 10
Bonner v. Gorman, 213 U. S. 86 (1909)	9, 10
Armstrong v. Manzo, 380 U. S. 545 (1965)	10
Mullane v. Central Hanover Trust Company, 339 U. S. 306 (1950)	10
Boddie v. Connecticut, 401 U. S. 371 (1971)	10
Fuentes v. Chevin, 407 U. S. 67 (1971)	10

Other Authorities

Rule 44, Rules of the Circuit Courts of South Carolina, Summary Judgment	4, 7, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79—

OSGOOD D. HAMLIN, PETITIONER,

versus

F. GREGORIE & SON, ESTHER GREGORIE, MARY ALLSTON GREGORIE, SARAH GREGORIE MILLER, FERDINAND GREGORIE, JR., ELIZABETH GREGORIE PENNERWILL, ANN GREGORIE GREENE, JULIAN WEAVER GRAY, ESTHER ROYALL GRAY SWAIN, SARAH WINDON GRAY MILLS, AND JOHN EVERETT GRAY, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

The Petitioner Osgood D. Hamlin respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the Supreme Court of South Carolina entered in this proceeding on July 24, 1979.

OPINIONS BELOW

The opinion of the South Carolina Supreme Court, not yet reported, appears in Appendix A hereto. The Order of the lower court, affirmed on appeal, has been incorporated verbatim as the Order of the South Carolina Supreme Court.

JURISDICTION

The judgment of the Supreme Court of South Carolina was entered on July 24, 1979. A timely petition for rehearing was denied on August 21, 1979, and this petition for *certiorari* was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1257 (3).

QUESTION PRESENTED

Did the Supreme Court of South Carolina, when it adopted verbatim an Order of a lower court as its opinion, change the law of summary judgment in South Carolina into a procedure permitting a lower court of original jurisdiction to circumvent a hearing of genuine issues at trial by its weighing of facts contested by pleading, affidavit and deposition statements and making conclusions of law for the basis of summary judgment, rather than sifting alleged fact for issue for trial, thereby depriving the Petitioner, and potentially any litigating parties in South Carolina, of his property without due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States?

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States, Amendment XIV, Section 1, provides: ". . . nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

STATEMENT OF THE CASE

By general warranty deed, regular in form, the Petitioner, a farmer with a tenth grade education, was conveyed approximately 601 acres of land in Christ Church Parish, Charleston County, on January 31, 1961 by Ferdinand Gregorie, a life-long businessman. At the same time Petitioner entered into an agreement with Ferdinand Gregorie, Jr., as agent for Ferdinand Gregorie, in which Petitioner granted an option for purchase of the same lands by Ferdinand Gregorie, Jr., as agent, from Petitioner for a period of five (5) years. The deed from Ferdinand Gregorie to Petitioner as well as the agreement between Petitioner as Optionor and Ferdinand Gregorie, Jr. as Optionee were prepared by W. H. Brockinton, Jr., a member of the Charleston Bar and long time attorney for the Gregorie family. The deed was witnessed by a daughter and a daughter-in-law of the Grantor Ferdinand Gregorie; and the wife of the Grantor, Esther R. Gregorie, renounced her right to any dower. W. H. Brockinton, Jr., the Gregorie family and drafting attorney, officiated and acted as Notary Public for the attestation of a subscribing witness and as Notary attesting the proper execution of the release of Dower by Mrs. Gregorie. Petitioner was not represented by an attorney.

The time for exercise of the option passed without exercise by Ferdinand Gregorie, Jr. The Grantor, Ferdinand Gregorie, died in 1968. In 1975, fourteen (14) years after the conveyance, the Respondents herein, heirs of the Grantor, served Complaint on the Petitioner alleging that on "information and belief" the conveyance of 1961 was intended by Ferdinand Gregorie and Petitioner to be a mortgage or an instrument intended to secure Petitioner for repayment to him of debts owed by Ferdinand Gregorie, that the consideration shown on the deed was inade-

quate, prayed for declaration that the deed was a mortgage and for an accounting and sale. The Petitioner, by timely verified answer, denied the allegations of the Complaint, affirmatively pleaded to be the owner in fee simple on account of the subject deed, that option agreement was never exercised nor was it extended, and that claim was further barred by laches of Respondents.

In 1978, Respondents moved for Summary Judgment provided by Rule 44 of the South Carolina Rules of Circuit Court similar in language and purpose to Rule 56 of the Federal Rules of Civil Procedure, which permit a summary judgment without trial where there is no genuine issue of fact. This motion was supported by original Complaint, portions of a deposition of Petitioner, and a single affidavit, that of W. H. Brockington, attorney who had drawn the deed and agreement of option and supervised the transaction. This affidavit of Brockinton is void of any averment that the deed was intended to be a mortgage, nor is there any averment by Brockinton that there is any enforceable debt obligation of Gregorie to the Petitioner surviving the deed of January 31, 1961, nor is there any averment of inadequate consideration. (Tr. 187-193). There were no affidavits by any of the Respondents.

Petitioner timely filed affidavit opposing Summary Judgment avering that he was owner in fee simple absolute; that conveyance was the result of arms length negotiations; that consideration was adequate; that no debt obligation of Gregorie to Petitioner, enforceable or otherwise, survived the conveyance; that he had exercised unchallenged dominion as an owner since 1961, paying taxes and insurance, farming, cutting timber and selling timber and land; that the intention of the Petitioner was always to purchase the property; that the expressed intention of Ferdinand Gregorie, Ferdinand Gregorie, Jr., and W. H. Brockinton, their attorney, was always that the sale and conveyance were absolute; that the option to repurchase was requested by W. H. Brockinton, attorney for Gregorie, and Petitioner assented; that W. H. Brockinton was relied upon to draft and supervise execution of all documents to constitute a complete sale; that W. H. Brockinton at no time advised Petitioner that the deed was anything but a deed.

Judge Paul Moore issued Order of Partial Summary Judgment in which he found as facts the following: there was a debt of Gregorie to Petitioner that survived the conveyance; that there was a deed and an agreement to reconvey; that the parties had not negotiated a sale; that the consideration was grossly inadequate; that the dealings between the parties were as creditor and debtor; that agreement for reconveyance set out the intentions of the parties; that burden of proof had been carried by Gregories by clear, definite, and convincing evidence (Tr. 207), and the deed and agreement of January, 1961 were intended as security for a debt. Upon these findings of fact, the lower court declared the deed to be a mortgage and directed the Master-in-Equity to conduct an accounting and sale (Tr. 223). At the time Judge Moore made this declaration, the record contained, by deposition and affidavit (Tr. 193-199), denial and affirmative defenses by the Petitioner of each of the findings of fact upon which Judge Moore had made to support his conclusion that the deed was a mortgage.

In South Carolina it is the rule that summary judgment cannot be granted when the facts avered, when considered in a light most favorable to the resistor of the motion, in this case the Petitioner, or the reasonable inferences deductible therefrom raise a genuine issue for trial, *Crescent Co. of Spartanburg, Inc. v. Insurance Company of North America,* 225 S. E. 2nd 656, 266 S. C. 598 (1976);

that a deed is what it purports to be unless it can be shown by clear, unequivocal and convincing evidence that it was intended to be a mortgage, *Britton v. Amos,* 128 S. E. 2d 161, 241 S. C. 336 (1962).

The Petitioner appealed to the Supreme Court of South Carolina and was denied benefit of oral argument. The South Carolina Supreme Court affirmed in a split decision the Order of Partial Summary Judgment and adopted Judge Paul Moore's Order as its own. Mr. Justice J. B. Ness dissented, finding a genuine issue of material fact and need for remanding and the taking of oral testimony.

The Petitioner timely petitioned for rehearing and raised the constitutional question that affirmation of the Order of the lower court deprived the Petitioner of his property without due process of law. This was the first opportunity to raise this issue, as the affirmation by the Supreme Court of South Carolina of the Order of the lower court effectively changed the rule of permissible action to be taken in a summary judgment, *Brinkerhoff-Farris Trust & Savings Company v. Hill,* 281 U. S. 673 (1930).

The Petition was denied with Justice Ness' dissenting and affirming that he would grant the Petition. The Supreme Court of South Carolina did not expressly pass on the constitutional issues so raised, though of course, it could not have affirmed the decision below without resolving the constitutional question.

REASONS FOR GRANTING THE WRIT

The Supreme Court of South Carolina, when it adopted verbatim an Order of a lower court as its opinion, changed the law of summary judgment in South Carolina into a procedure permitting a lower court of original jurisdiction to circumvent a hearing of genuine issues at trial by its weighing of facts contested by pleading, affidavit and deposition statements and making conclusions of law as an acceptable basis for the granting of summary judgment, rather than sifting alleged facts for issues for trial, thereby depriving the Petitioner, and potentially any litigating parties in South Carolina, of his property without due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

In granting partial summary judgment in this case, the lower court erred in that it did not sift the facts interpreted in the light most favorable to the Petitioner defending against the motion in order to determine if there were genuine issues for trial, as it was required to do under Rule 44 of the South Carolina Circuit Court Rules. Contrary to the Rule, the lower court made findings of fact based upon mere conflicting allegations without hearing. These findings deprived the Petitioner of his ownership claim to approximately 601 acres of land, which he avers by verified answer and supporting affidavit, that he purchased in 1961 and which is evidenced by a general warranty deed, regular in form, purporting to convey title in fee simple absolute, and prepared by the attorney for the Grantor. The lower court's gross misinterpretation of its role under the summary judgment rule was clearly raised on appeal to the State Supreme Court and the swift reversal was expected. But the Supreme Court denied oral argument and affirmed the lower court without opinion, simply by adopting the lower court's lengthy order, which found fact, rather than sifted

facts and which without hearing, solely on the basis of written allegations, resolved disputed factual issues and deprived the Petitioner of his land without giving him any reasonable opportunity to be heard, to confront witnesses, or to defend his claim. The lower court's grant of summary judgment was an erroneous exercise of its duty under the Rule, but the Supreme Court's affirmance literally changed the rule so as to allow disputed factual issues to be resolved without trial, indeed, without any hearing at all, but on the mere unproven allegation of written instruments, even though they be controverted. Whereas the rule prior to this decision was that summary judgment cannot be granted if the facts avered, when considered in a light most favorable to the resistor of the motion, or the reasonable inferences deducible therefrom, raise a genuine issue for trial, *Crescent Co. of Spartanburg, Inc. v. Insurance Company of North Amercia,* 225 S. E. 2d 656, 266 S. C. 598 (1976). This ruling reduces the law of summary judgment to a primative compurgation procedure, wherein litigants can be deprived of property without due process of law, without any hearing, upon order of a lower court which weighs conflicting allegations of opposing parties, from this weighing arrives at findings of fact and conclusions of law without actually seeing the litigants, seeing their witnesses, considering the admissibility of the evidence that would be required to support the allegations, and without the opportunity of confrontation of witnesses by opposing parties. The due process claim was raised at the first available opportunity on Petition for Rehearing before the South Carolina Supreme Court, but Petition was denied without opinion. The claim is appropriately raised again in this Court. *Brinkerhoff-Farris Trust & Savings Company v. Hill,* 281 U. S. 673 (1930); *State of Missouri ex rel. Missouri Insurance Company v. Gehner,* 281 U. S. 313 (1930);

Tidal Oil Company, et al. v. Flannagan, 263 U. S. 444. (1924).

The United States Supreme Court has not attempted to describe to the States in minute detail those due process elements which will be required in their court rules in order that they may withstand constitutional scrutiny as stated in *Twining v. New Jersey,* 211 U. S. 78, 110 (1908):

> "... due process requires that the court which assumes to determine the rights of parties shall have jurisdiction [citations omitted], and that there shall be notice and opportunity for hearing given the parties [citations omitted]. Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has unto this time sustained all laws statutory or judicially declared regulating procedure, evidence and methods of trial and held them to be consistent with due process of law [citations omitted]."

In the instant case, however, the South Carolina Supreme Court did not merely affirm an erroneous lower court decision after an appropriate hearing which, it is conceded, would present no claim for resolution in this Court, *Bell Telephone Company of Pennsylvania v. Pennsylvania Public Utility Commission,* 309 U. S. 30 (1940); *Jones v. Buffalo Creek Coal Company,* 245 U. S. 328 (1917); *Standard Oil Company v. Missouri,* 224 U. S. 270 (1912); *Bonner v. Gorman,* 213 U. S. 86 (1909). Rather, without hearing, the State Supreme Court affirmed an erroneous decision, and necessarily decided that a court of original jurisdiction can deny litigants any hearing for the resolution of disputed fact essential to their case, and that a court of original jurisdiction can resolve disputed factual issues solely on the basis of a meager preliminary written record containing conflicting allegations.

Bell Telephone, Jones, Standard Oil, and *Bonner,* all *supra,* specifically stated that erroneous State decisions would not be reviewed if made after a full hearing. There has been no hearing yet in this case, although genuine trial issues were raised in Petitioner's affidavit and Rule 44, as construed until this case, would have required a hearing on factual issues. *Crescent Co. of Spartanburg, Inc. v. Insurance Company of North America, supra.* The Supreme Court has by its affirmant of a lower court amended the rule on summary judgment to allow the taking of property without a hearing on disputed ownership issues. This is fundamentally unfair, and the violation of one of the most basic premises of due process of law: The opportunity to be heard, *Twining, supra.*

This Court has held that due process will tolerate variances in the form of a hearing appropriate to the nature of the case, *Armstrong v. Manzo,* 380 U. S. 545 (1965); *Mullane v. Central Hanover Trust Company,* 339 U. S. 306 (1950), and depending on the importance of the interest involved, *Boddie v. Connecticut,* 401 U. S. 371 (1971), but it has insisted that prior to a deprivation of property, a hearing, in whatever form, must take place, *Fuentes v. Chevin,* 407 U. S. 67 (1972). The Supreme Court of South Carolina, in this case, overruled the well settled construction of summary judgment rule and held that although the Petitioner alleges that he purchased approximately 601 acres of land in 1961 and has a deed absolute on its face to prove it, which land he has been farming, maintaining and paying taxes on for seventeen (17) years, the lower court of original jurisdiction can declare his deed to be a mortgage by grant of summary judgment based solely on contradictory written allegations, and thereby, deny, not only the Petitioner but, any party litigant in South Carolina his fundamental constitutional right to due process of law.

To allow such a fundamentally unfair summary judgment rule to become law in South Carolina would be tantamount to turning the clock back to the time before due process of law was even an embryonic idea, to an age when compurgators were the best the judicial process could offer in the way of "justice" to disputants. The results, so vividly recorded by history, may settle disputes but not administer justice. Decisions without benefit of hearing, when facts are patently in dispute, can and will result in an outrageously erroneous, unfair and arbitrary rule contrary to the constitutional right of due process of law which has been so valiantly secured and maintained for us by our courageous ancestors as our birthright.

CONCLUSION

This Court should grant *certiorari* and the judgment below should be reversed.

Respectfully submitted,

FRED G. SCOTT, JR.,
Post Office Box 70025,
North Charleston, S. C. 29405,
Attorney for the Petitioner.

Of Counsel:
JACK WHITE.
129 Meeting Street,
Charleston, S. C. 29401.

APPENDIX

APPENDIX

Appendix A: Opinion of the South Carolina Supreme Court

PER CURIAM: This case is on appeal before us because the Honorable Paul Moore, Circuit Judge, granted a summary judgment in favor of the plaintiffs. His order sets forth and properly disposes of all the issues submitted to this court. Let that order be printed as our directive.

/s/ J. WOODROW LEWIS, C. J.,
/s/ BRUCE LITTLEJOHN, A. J.,
/s/ WM. L. RHODES, JR., A. J.,
/s/ GEORGE T. GREGORY, JR., A. J.,
J. B. NESS, A. J., Dissents.

ORDER OF JUDGE PAUL MOORE

This matter comes before me to be heard on Monday, June 12, 1978, on Motion of the Plaintiff for Partial Summary Judgment declaring a deed, absolute on its face, an equitable mortgage. The Plaintiff was represented by the firm of Holmes, Thomson, Logan & Cantrell, and the Defendant was represented by Fred B. Scott, Esquire and Jack White, Esquire.

The controversy over which the litigant parties argue can be summarized as a dispute as to whether a deed, absolute on its face accompanied by grantee's contemporaneous agreement to re-convey on payment of a stated sum of money within a given time period, was intended as a mortgage. Stated differently the question would be whether or not the document and accompanying agreement was intended as a deed absolute, convey the fee and the Plaintiff's equity of redemption or was it intended as security for a debt and hence as a mortgage.

I have fully considered all pleadings filed in this case together with the depositions of O. D. Hamlin, taken on April 20th, 1976 and on August 26th, 1976; an affidavit of W. H. Brockinton, Jr., dated October 18, 1977 (Mr. Brockinton being the attorney who prepared the documents in dispute in this litigation), and the affidavit of Osgood D. Hamlin, dated June 5th, 1978.

FACTS

The property in question is approximately 601.17 acres of land located in Mount Pleasant, South Carolina, known as "OAKLAND" Plantation, which is the longtime Gregorie family home place. In the late 1950's and early 1960's the oil distributorship known as F. Gregorie & Son which was owned and operated by members of the Gregorie family, was experiencing financial difficulty, such economic problems apparently being fairly well known throughout the financial community in the County of Charleston. The company was having particular difficulty with two of its suppliers, to wit: Arkansas Fuel Oil Corporation of Shreveport, Louisiana, and Carolina Fleets, Inc. of Anderson, South Carolina.

The Plaintiff in this action, Osgood D. Hamlin, was a neighboring landowner, kinsman, and longtime friend of the Gregorie family; apparently was particularly close to the elder Mr. Ferd Gregorie. Beginning approximately in the mid-1950's, Hamlin had loaned money to that business at the request of Ferd Gregorie, Sr. In addition, Hamlin co-signed a promissory note held by Arkansas Fuel Oil Corporation in the principal amount of Thirty Thousand ($30,000.00) Dollars, he being the one promisor thereon at that point financially responsible.

During approximately the same time, Ferd Gregorie, Sr., suffering from ill health, turned the operation of the business over to Ferdinand Gregorie, Jr., hereinafter referred to as "Gregorie."

The status of affairs in late October, early November 1960 was that Arkansas Fuel Oil Corporation and Carolina Fleets Inc. (City Services), together with a number of other, smaller creditors, were pressing for collections upon their respective debts.

The subject deed and re-purchase agreement were executed on January 31, 1961, the deed however was held unrecorded until March 2, 1963, at which time it was recorded in Book U-78 at Page 66 in the R. M. C. Office for Charleston County.

The debt with Arkansas Fuel Oil Corporation and City Services was a continuing one and in late January 1961,

both companies still had outstanding promissory notes. As a result from continuous pressure by these two major creditors, attempts were made to sell the business of F. Gregorie & Son. Failing this, the First National Bank of South Carolina was approached with the proposal that sufficient monies to pay these debts be loaned by the Bank, the repayment of said monies to be secured by a first mortgage on "OAKLAND" Plantation. Both Hamlin and Gregorie were involved in the discussions with the First National Bank relative to this loan. As a result of these discussions with the Bank, a note and mortgage were executed on January 26, 1961 by Ferdinand Gregorie, Sr., in favor of the First National Bank of South Carolina in the amount of Thirty-Five Thousand ($35,000.00) Dollars. The note but not the mortgage was guaranteed by Hamlin. On this same date, the deed, purporting to convey "OAKLAND" Plantation was executed by Ferdinand Gregorie, Sr., to O. D. Hamlin, the consideration being stated as follows: "assumption of balance due on note of Ferdinand Gregorie to the First National Bank of South Carolina as hereinbelow set forth and the sum of Five ($5.00) Dollars."

In addition to this deed, a re-purchase agreement was executed between F. Gregorie, Jr., as agent for F. Gregorie, Sr. and O. D. Hamlin on January 31, 1961.

The amount of money necessary to pay off both Arkansas Fuel Oil Corporation and City Services at this time was determined to be Thirty-Nine Thousand Seven Hundred Ninety-One and 68/100 ($39,791.68) Dollars, the said debts being paid to both companies from the proceeds received from the first mortgage on "OAKAND" Plantation obtained from the First National Bank, together with a further advance from Hamlin himself.

In addition, another mortgage was executed on behalf of F. Gregorie & Son as well as on behalf of Ferd Gregorie, Sr., and F. Gregorie, Jr.; said mortgage was executed in favor of O. D. Hamlin in the amount of Thirty-Five Thousand ($35,000.00) Dollars, on January 31, 1961 (but was held unrecorded until March 31, 1966, whereupon it was recorded in Book E-85 at Page 269 in the R. M. C. Office for Charleston County). Security for this mortgage was both

real estate and rolling stock of the business, F. Gregorie & Son.

Rule 44 places upon me the duty of determining the unquestioned facts before the Court based upon affidavits and instruments, and I am under very strict limitations. Two particular principles have governed my sifting of the facts. First, I consider the deed and the memorandum of agreement attached to the Complaint as part and parcel of the same transaction. Second, I must search for the intention of the parties at the time of the transaction and not as any of them may interpret their intentions at this time.

With the above restrictions in mind, I therefore find that the evidence available to me under the strict rules for summary judgment proceedings leaves no other conclusion than that:

One: On January 31, 1961, F. Gregorie & Son was heavily in debt and had no other way of raising funds to save the business than to put up the family residence "OAKLAND" Plantation containing approximately six hundred (600) acres.

Two: Two of its large creditors, Arkansas Fuel Oil Corporation and Carolina Fleets, Inc. were threatening to close down the business and foreclose its mortgage on the business.

Three: The deed and memorandum of agreement Exhibit "A" were executed on the same date.

Four: The re-purchase right approximated the amount of the total indebtedness of the Gregories.

Five: The stated consideration for the deed was Thirty-Five Thousand ($35,000.00) Dollars whereas only two years later lots were sold off at a value of approximately Two Thousand ($2,000.00) Dollars per acre, so that the alleged purchase price was totally inadequate when considered as a purchase price but closely approximated the indebtedness when the existing mortgage and the memorandum of agreement are considered.

Six: The basic problem addressed by the parties at the time of the transaction was provision of money to take care

of the debts of F. Gregorie & Son to keep it in business, and there is no evidence that the Gregories intended to sell "OAKLAND" Plantation. Mr. Hamlin's testimony is in conflict with other statements made by him in his deposition. Even he does not undertake to state that either the purchase or the price was discussed with the Gregories.

Seven: Mr. Hamlin had been in the habit of lending the Gregorie family money over a long period of time as a customary thing and knew their necessitous situation.

Eight: The terms of the agreement to re-convey indicate that the reconveyance was to be made upon payment of the amount of money owed by the Gregories plus interest to the time of repayment.

Nine: The memorandum of agreement Exhibit "A" states: "It was agreed that the aforesaid tract of land would simultaneously be conveyed by Ferdinand Gregorie to O. D. Hamlin as security for his additional financial assistance."

I find that the conveyance of "OAKLAND" Plantation on January 31, 1961, which was accompanied with a re-purchase agreement was intended as security for a debt owed by the Gregories to O. D. Hamlin rather than as a deed or sale of the property.

This conclusion was reached by my considering and finding the following:

(1) That there was an existence of debt from Gregorie to Hamlin which debt survived the January 31, 1961 conveyance;

(2) There was a deed, plus a separate agreement, to re-convey the subject property;

(3) There were previous negotiations of the parties which indicated that (a) there was no discussion between the parties as to a sale; (b) there was no discussion between the parties as to price or consideration; (c) Hamlin claims to have purchased "OAKLAND" from a third party which never held legal title; (d) Hamlin never attempted to have the property appraised prior to the sale; (e) there was no contract of sale preceding the conveyance.

(4) The consideration stated as a purchase price was grossly inadequate for the more than six hundred (600) acres of "OAKLAND" Plantation in 1961;

(5) The dealings between the parties were as creditor and debtor;

(6) The terms of the agreement for reconveyance quite clearly set out the intentions of the parties in 1961;

(7) The burden of proof by the Plaintiff has been carried by clear, definite and convincing evidence;

(8) The defense of laches does not apply in this case.

These grounds are discussed in detail below:

(1) Existence and Survival of Debt

A strong indicia of whether the purported conveyance was intended as security for a debt or was a sale or deed is reflected by the existence or lack thereof of a debt or liability between the parties either existing prior to the contract or rising from a loan made at the time of the contract whereby the debt is still left subsisting after the transaction in question, *Hamuton v. Hamer,* 99 S. C. 31, 82 S. E. 997. "The effect of this existing debt usually turns out to be that the payments stipulated for the agreement to reconvey is in reality the payment of this existing debt, and the whole transaction amounts to a mortgage, whatever language the parties may have used, and whatever stipulations they may have inserted in the instrument. *Hamilton.* (*supra.*)

The existence of a debt or liability flowing from Hamlin, the creditor, to Gregorie, the debtor, at the time of the transaction in question is not contested by Plaintiff or Defendant. The Memorandum of Agreement, quite accurately outlines the history of the relationship between Gregorie and Hamlin and the existence of a debt:

> "MEMORANDUM OF AGREEMENT made and entered into at Mt. Pleasant, South Carolina, this 31st day of January, 1961, by and between F. Gregorie, Jr., and O. D. Hamlin, WITNESSETH:
>
> WHEREAS, F. Gregorie & Son, a corporation of which F. Gregorie, Jr. is President, has in recent months **been pressed by certain of its creditors** more

> particularly by Carolina Fleets, Inc., and Arkansas Fuel Oil Corporation; and
>
> WHEREAS, O. D. Hamlin of Mt. Pleasant, South Carolina, had heretofore assisted F. Gregorie & Son in the f[illegible]ncing of its operation; and
>
> WHEREAS, by reason of the aforementioned two said debts, it became **necessary to afford security therefor in the nature of certain mortgages** that appropriate arrangements could be made to pay the amounts due and owing Carolina Fleets, Inc., and Arkansas Fuel Oil Corporation;" (emphasis added).

There is no controversy within the evidence but that a debt existed at the time of the conveyance in January, 1961, and in addition, there is no dispute whatsoever that Hamlin was a substantial creditor at that time, and that once the transaction in January of 1961 was completed, there was still a debt subsisting thereafter.

The fact that the debt was not extinguished at the time of the subject conveyance, is evidence from the mere fact that there was a re-purchase agreement setting out the amount of money necessary to re-purchase the property.

Another factor which relates closely to the continuation of the debt is where the payments stipulated in the agreement to reconvey is approximately the same amount as the amount of the existing debt.

As stated in the Defendant's, Hamlin's, Answer, **Second Defense, III:**

> "That Defendant, O. D. Hamlin, under the provisions of that agreement, shown as Exhibit "A" of the Complaint granted to F. Gregorie, Jr., as agent, an option to re-purchase the said tract of land for $79,000.00, payable under certain installment conditions . . ."

The total of Gregorie's indebtedness at the time of the execution of the instrument in question was $79,324.00, and the re-purchase agreement was for $79,000.00.

Deposition of O. D. Hamlin of April 20, 1976:

> "A. Well, it was supposed to be purchased at—for seventy-nine thousand dollars, payable on or before January, 1966."

(2) Deed Plus Separate Agreement

Where a separate instrument is executed as a part of the same transaction as the conveyance, the two instruments are construed together if the writing is in the nature of a conditional sale or a re-purchase agreement. *55 Am. Jur. 2d. Mortgages.*

South Carolina has gone so far in the case of *Francis v. Francis,* 78 S. C. 178, 58 S. E. 804, that the court practically held that the mere fact that a contract to reconvey was executed simultaneously with the deed creates in legal effect a mortgage. Notwithstanding this rather strong precedent, the better case for comparison is *Stackhouse v. Conerly,* 110 S. C. 161, 96 S. E. 255, which holds that a conveyance accompanied by a re-purchase agreement is a strong circumstance to be considered in the determination between a deed absolute and equitable mortgage.

(3) Previous Negotiations of Parties

As stated in *41 C. J. 337, § 100:* "On the question whether a deed absolute in form was intended as a mortgage, it is proper to consider the previous negotiations of the parties, their agreements and conversations and the course of dealings between them prior to and leading up to the deed in question."

In *Mason v. Finley, et al.,* the following factors are used to determine whether or not a sale was in fact intended:

1. That there was no evidence that the owner desired to sell or that the lender desired to purchase.

2. That during the negotiations nothing was said about a sale of the property.

3. That no price was fixed as a selling value of the property and no discussion along that line was made.

4. That no attempt was made to ascertain the real value of the property upon which a sale would reasonably be based, greater liberality being exercised when a loan was intended.

5. That the grantee made no inquiry as to the value of the land.

The circumstances within the case at bar indicate overwhelmingly that no outright sale was ever contemplated by either party. In all the conversations between Gregorie and Hamlin there is not a word stated between them about buying the property. There was never, at any time, a proposal by the Plaintiff to sell "OAKLAND" Plantation. Instead, Gregorie had attempted to sell the oil distributorship business in an obvious effort to protect his home and "OAKLAND" Plantation.

Additionally, the testimony is uncontroverted, even in the face of Hamlin's June 5, 1978 Affidavit that he "bought" "OAKLAND", that the sale most certainly was not preceded by an Agreement to sell or by a Contract of Sale.

In fact, a significant aspect of the Gregorie/Hamlin dispute is that Mr. Hamlin makes no pretense of having discussed the purchase of "OAKLAND" Plantation with the Gregories nor did he discuss the price; nor did Hamlin attempt to obtain an appraisal of the property. In short, there was simply no evidence that Hamlin took any of the normal and customary steps which would indicate by any normal construction, that he was "buying" "OAKLAND" Plantation in January of 1961. In addition, there is no evidence that Gregorie ever desired to sell "OAKLAND" or that he ever thought that he was in fact selling it.

It is of particular note that Hamlin contends that he made arrangements to buy "OAKLAND" Plantation from City Services, Inc., or in the alternative, from Arkansas Fuel Oil Company, neither of said companies ever having had legal title to "OAKLAND" Plantation.

Deposition of O. D. Hamlin of April 20, 1976, Page 35, Line 10:

> "A. Well, they agreed to sell me the place, and I agreed to buy it.
>
> Q. Okay. You made an arrangement with City Services to buy the place. Is that correct?
>
> A. Yes, that's right.
>
> Q. That was with Mr. Carter, who is the local representative of City Services?
>
> A. Mr. Carter and Mr. Smirker, who was the District Manager at the time."

In addition, the Defendant, Hamlin, indicated that he did not have an appraisal made, nor was he interested in whether or not the lending institution appraised the property.

Deposition of O. D. Hamlin of April 20, 1976, Page 82, Line 13:

> "Q. . . . Did you at any time have an appraisal done of the property for your purchase of "OAKLAND" Plantation as you put it?
>
> A. No, sir.
>
> Q. Did the bank, to your knowledge, ever make an appraisal of the property?
>
> A. Yes, sir. I think they did.
>
> Q. What was the value per acre of the property at that time?
>
> A. I don't know what they appraised it at.
>
> Q. You didn't ask?
>
> A. No, sir."

It is interesting to note that the facts are not in conflict that price was not discussed between the parties.

Deposition of O. D. Hamlin of April 20, 1976, Page 83, Line 20:

> "Q. Okay. Now what, if anything, was said in negotiating with Ferd Gregorie, Sr., or Jr. with regard to the price of the land?
>
> A. I don't think there was anything said with him about it."

(4) **Inadequacy of Consideration/Price**

The basic rule concerning consideration which is followed in South Carolina is set out in *41 C. J. 337 § 101.* "The value of the property at the time the deed was made is pertinent and material. For if it shall be shown that the consideration passing between the parties, or the amount to be paid by the grantor on exercising his right to repurchase, would be fairly proportional to the value of the property, if considered as a debt or loan secured by a mortgage thereon, but grossly inadequate if regarded as the price of the land upon an absolute sale, this will tend

strongly to show that the sale could not have been intended, but that the transaction should rather be treated as a mortgage."

Obviously, the value of "OAKLAND" Plantation at the time the deed was made is material to the inquiry at hand. Here also, the facts are not in controversy. The subject deed recites the consideration as Thirty-Five Thousand ($35,000.00) Dollars.

Deposition of O. D. Hamlin of April 20, 1976, Page 40, Line 10:

> "A. The total amount owing City Services at the time that they were paid was thirty-nine thousand seven hundred and ninety-one sixty-eight."

It is agreed that "OAKLAND" Plantation contained 601.17 acres of land in 1961 and there is sufficient information from within the records before the Court to establish a reasonable value for the property, inasmuch as in early July, 1963, small lots of land of two acres each began being sold at approximately Two Thousand ($2,000.00) Dollars each.

Deposition of O. D. Hamlin of April 20, 1976, Page 77, Line 14:

> "Q. All right, sir. You say you sold lots of land off of "OAKLAND" Plantation. Is that correct?
>
> A. Yes, sir.
>
> Q. Do you remember a sale to Theyman Shelby and a Hessie M. Shelby, July 23rd, 1963?
>
> A. Yes, sir.
>
> Q. In the amount of **two thousand dollars?**
>
> A. Yes, sir."

Using that Two Thousand ($2,000.00) Dollar per two acre figure, the high side of the value of "OAKLAND" Plantation would be Six Hundred One Thousand One Hundred Seventy and No/100 ($601,170.00) Dollars, and cutting the two acres price in half for a conservative figure leaving a low value of Three Hundred Thousand Five Hundred Eighty-Five and No/100 ($300,585.00) Dollars for "OAKLAND" Plantation. The purported deed recited Thirty-

Five Thousand ($35,000.00) Dollars as consideration for the purchase and the re-purchase agreement recited Seventy-Nine Thousand ($79,000.00) Dollars.

Taking the lowest figure, the value of "OAKLAND" Plantation less than two years after the transaction in question overwhelmingly demonstrates the inadequacy of the price as recited in the deed. The only reasonable inference therefore, is that the transaction in question could not have been intended as a sale but rather the conveyance was intended to secure Hamlin's debt and was in the nature of a mortgage.

(5) Dealings Between Parties

There is, of course, no contradiction in the testimony that the Gregorie family borrowed money from Hamlin in a customary and long-term fashion. As is stated in the Affidavit of W. H. Brockinton, Jr. on Page 1:

> "Deponent did come to understand that this practice (Mr. Hamlin's loaning money to F. Gregorie & Son) was a long-standing one between the Messrs. Gregories and Hamlin, so much that when the joint pressure of the indebtness (*sic*) the claims of Arkansas Fuel Oil Corporation and Carolina Fleets, Inc., was being applied, Mr. Hamlin was as interested in saving the business as were the Messrs. Gregories."

In addition, another indicia of customary and normal course of dealings which gives aide in determining the intention of the parties is how the contact between the parties to the transaction originated, and if the grantor attempted to borrow money at the inception of the transaction. *Mason v. Finley (supra).*

The testimony in the instant case reveals that the origin of the transaction in question in January, 1961, was a direct result of Gregorie making application for a loan to both First National Bank and to Hamlin. The difference in this case, of course, is that a third-party lending institution was contacted from which to borrow money; but it was done jointly with Hamlin, and in addition, Hamlin himself was responsible for advancing additional funds to pay off

the two major pressing debts of Arkansas Fuel Oil Company, Inc. and City Services, Inc.

Clearly, the negotiations between Gregorie and Hamlin or, at least the discussions between the two, had their origin in the nature of a request to borrow monies to pay the creditor and Gregorie made the request to both Hamlin and to the First National Bank. Hamlin, in fact, later advanced monies and co-signed the note with the First National Bank.

The application by Gregorie was for a loan, and all the negotiations which were conducted were with respect to the form of the security upon the premises in question; and Gregorie at no time made any pretense that he would have sold "OAKLAND" Plantation for the sum actually advanced by Hamlin or for five times that amount. There is simply not a word anywhere that suggests a sale in any logical application of the facts in evidence.

It is not open to question that the relationship between Gregorie and Hamlin was one of lending and borrowing when one considers and applies the rules as set down in *Mason* (*supra*), re-affirmed in *Thomas v. Bartelle,* 261 S. C. 531, 201 S. E. (2d) 243 (1973); and in *Britton v. Amos,* 241 S. C. 336, 128 S. E. (2d) 161 (1972). This relationship shows that where the parties had the only negotiation which preceded the execution of the deed and it was a discussion requesting a loan; the mortgagee-mortgagor relationship was not broken by a new negotiation for a sale, because the initial request for a loan will be presumed to have continued clear through the consummation of the transaction.

The South Carolina Supreme Court has held that a **new relation** of the proposed buyer and seller, once intervened, must be shown in order to sustain a sale, once the transaction was initiated by an application for a loan. *McHall v. Hall,* 41 S. C. 168, 19 S. E. 307. *Brown v. Bank,* 55 S. C. 51, 32 S. E. 816.

I find there was no additional consideration which would change the nature of this instrument from a mortgage.

(6) **Terms of the Contract for Conveyance**

The terms of the contract for reconveyance in the instant case overwhelmingly indicate that Hamlin simply did not consider that he had an outright deed until after he considered Gregorie to be in default in payment. This, of course, is gleaned from the January 31, 1961 date of execution of the deed and the March 2, 1963 time of recording the said deed as has been discussed *infra.*

In reviewing the language used in several cases, such as *Mason v. Finley* (*supra*), and *Brownlee v. Martin* (*supra*), wherein the significant language concerning the re-purchasing agreement is as follows:

> (1) "I hereby agree to reconvey to "Plaintiff" by a Quit-Claim Deed, the land which she deeds to me of even date herewith, provided she pays me One Hundred and No/100 ($100.00) Dollars and eight (8%) percent interest thereon from this date by November 15, 1910, or any time previous to the above date, but it is expressly understood that if if the payment of the above amount is not made by November 15, 1910, that this agreement is null and void, and that the deed executed by her of even date herewith is a straightout warranty deed and not a conditional deed or mortgage." *Mason, (supra).*
>
> (2) "If the payment of the above amount is not made by November 15, 1910, that the agreement is null and void, and that the deed executed by her of even date herewith (will be a straightout warranty deed and not a conditional deed or mortgage)." *Brownlee, (supra).*

The aforementioned cases having considered that language the Court found that there was in fact no deed, but rather the conveyance was in fact an equitable mortgage for the securing of a debt.

Significantly, both cases point to those sections of the re-purchase clause which sets a deadline whereby if the money owed is not paid by that time, then the creditor claims to have an absolute fee-simple title. The significant point made is "why is such a stipulation necessary if one already has such title under the absolute deed received from

the Grantee?" As was held in both the *Mason* and *Brownlee* cases such stipulations must have been deemed necessary because they felt that the deeds were not what they appeared to be, but were merely mortgages with the right of redemption on the part of the Grantee.

The intention of Hamlin at the time of the transaction has been shown convincingly that a sale was not contemplated. Even Hamlin's testimony in his Affidavit of June 5, 1978 reflects that he would only purchase "OAKLAND" Plantation **if the Gregories desired same.**

Affidavit of O. D. Hamlin, Page Four, Paragraph Two, Sentence Three:

> "Deponent advised U. H. Brockinton and Ferd Gregorie that **if the Gregories desired,** he would purchase "OAKLAND" for an amount to be agreed upon, pay debt to Arkansas Fuel Oil Corporation, participate in operation of the business and finance the business." (Emphasis added.)

There could be no stronger statement of Defendant's Hamlin's intention, and as such, it could **not** possibly have supported the assertion that the deed absolute on its face was in reality a sale.

In addition, Hamlin asserts in another portion of his June 5, 1978 Affidavit, Page Three, Paragraph Three, Sentences One and Two:

> "Deponent is a farmer, knew the property known as "OAKLAND", and was in the market for a purchase of additional farm land. Deponent desired to buy "OAKLAND" **if it were to be foreclosed upon by Arkansas Fuel Oil Corporation."** (Emphasis added.)

The evidence is that Arkansas Fuel Oil Corporation's mortgage on "OAKLAND" Plantation (but not other personal obligation notes) was satisfied on October 31, 1960 and recorded in the R. M. C. Office for Charleston County on November 1, 1960. Inasmuch as there is no public record filed which has ever named either of these creditors as having title to "OAKLAND" it therefore was a legal impossibility for Arkansas Fuel Oil Corporation to sell "OAK-

LAND" Plantation in 1961. This also defeats the only contingency, other than the consent of the Gregories by which Hamlin asserts he would purchase "OAKLAND" Plantation. Hamlin maintained in his June 5, 1978 Affidavit that he would purchase "OAKLAND" for an "amount to be agreed upon". According to his own testimony and the pleadings of Gregorie, no amount had been agreed upon or had ever been discussed.

(7) Burden of Proof

In *Shiver v. Arthur,* 54 S. C. 191, the firm rule in South Carolina regarding burden of proof in actions to declare an absolute deed a mortgage is stated:

> (1) "An instrument of writing is what upon its face it purports to be.
> (2) The complaint must contain the necessary allegation that the deed, although absolute on its face, was intended as a mortgage.
> (3) These allegations must be sustained by a *prima facie* showing that they are true. When this is done, however, it removes the presumption arising from the fact that a paper is presumed to be what it states and purports.
> (4) When this is done, it is incumbent on the mortgagee to remove the inference that may be drawn from such *prima facie* showing. This is sometimes spoken of as the burden of proof, but is simply making it incumbent on the mortgagee to disprove the case as then made."

Gregorie has established the transaction as being security for the debt to Hamlin in the way of an equitable mortgage by clear, specific, definite, and convincing evidence; this showing was more than the presentment of a *prima facie* case sufficient to initiate presumptions as to the nature of the instruments, the magnitude of the overwhelming evidence is sufficient by itself to declare the deed absolute in form as an equitable mortgage as a matter of law.

Having found the deed to be an equitable mortgage by close examination of the evidence, the subsequent dealings and transactions between Gregorie and Hamlin did not

change the nature of the transactions: "Once a mortgage, always a mortgage, unless there is additional consideration for any change made; *Leland v. Morrison (supra).* There of course is absolutely no evidence whatsoever of such additional consideration.

McHall v. Hall, 45 S. C. 41, supports this view inasmuch as it established that a transaction which was originally intended as security shall never be turned into an absolute conveyance.

(8) Defenses

The last contention which need be addressed is the issue of laches raised by Hamlin in his Answer.

In *Leland v. Morrison,* 92 S. C. 518, the rule of laches or lapse of time is clearly presented:

"Delay in ascertaining an absolute deed to be a mortgage has not the same effect upon the rights of the parties that attends delay in seeking to enforce in equity the performance of an executory contract. Payment does not stand on the footing of performance in equity and once a mortgage, always a mortgage, is a maxim of law in South Carolina.

> The character of the deed being fixed by the evidence as conditional the mortgagor has the same time to make payment that any other debtor has. **The right to foreclose and the right to redeem are reciprocal, and if one is barred, the other is also barred.''** (Emphasis added.)
>
> There is no doubt that where a deed, though absolute in form, is shown to be intended as a security for the payment for a debt, it **will always remain a security until foreclosed by some judicial proceeding,** or unless the party deprives himself of the interest he has in the property by some subsequent conveyance or relinquishment of interest." (Emphasis added.)

The *Leland* case goes further and states that under the law of South Carolina, "the life of a mortgage is 20 years, and any time during that period, the owner of it has the right to foreclose it, and if the statute of limitations does

not bar the right to foreclose, it would not bar the right to redeem."

Inasmuch as the judgment of this Court is that the conveyance or transaction is now, and from its inception has been a mortgage, the defense of laches immediately falls.

Gregorie's actions were reasonable under the circumstances. The testimony reflects that the first Notice given by Hamlin of his ownership claim was in 1974, the same year in which this suit was commenced.

I find that the instruments executed on January 31, 1961 were intended as security for a debt and by Gregorie and Hamlin rather than as a sale or absolute conveyance of the property known as "OAKLAND" Plantation, Now Therefore,

IT IS ORDERED, ADJUDGED AND DECREED that the Deed dated January 31, 1961, from Ferd Gregorie to O. D. Hamlin is hereby declared to be a Mortgage now and as of the date of its execution and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that this cause be referred to the Master-in-Equity for Charleston County, the Honorable Louis E. Condon, to take an accounting and report to this Court the amount due to the Defendant, Hamlin, by the Plaintiff, Gregorie. In making up said accounting, either party to the cause is hereby permitted to show the amount due by the Plaintiff on the said indebtedness; and said Master is further directed in making said accounting to ascertain the appropriate set-off and credits attributable to both parties, interest and/or abatement of interest, and to determine what taxes and other expenses or improvements, if any, be attributable to either party.

UPON completion and submission of the Master's Report; and the confirmation thereof, the Circuit Court shall give Judgment in favor of Hamlin, against the other parties Plaintiff and Defendant for the amount thus found to be due; and the Circuit Court shall affix a reasonable time thereafter in which the other parties, Plaintiff and Defendant shall have to pay that sum to Hamlin; and, if such

payment is not made, the Circuit Court shall issue its Decree or Foreclosure and Sale of the equitable Mortgage of said tract, known as "OAKLAND" Plantation, in the usual form of foreclosure and barring the equity of redemption.

AND IT IS SO ORDERED.

NESS, A.J. (Dissenting): Concluding that a genuine issue of material fact exists, I would reverse and remand for the taking of testimony.

Respondents Gregorie, *et al.* brought this action to declare a 1961 deed from the late Ferdinand Gregorie, Sr. to appellant Hamlin a mortgage. Appellant denied the deed was intended to be a mortgage, and unequivocally stated in his deposition (Tr. 60) and in his affidavit (Tr. 197) that he "bought" the disputed property in fee simple absolute.

It is well settled that in order to convert an apparent deed into a mortgage, the proof must be clear and convincing. *Arnold v. Mattison,* 3 Rich. Eq. 153 (1850); *Thomas v. Bartell,* 261 S. C. 531, 201 S. E. 2d 243 (1973). Moreover, in order to warrant the granting of summary judgment, no genuine issue of any material fact may exist. *Thevenot v. Commercial Travelers Mutual Accident Association of America,* 259 S. C. 235, 191 S. E. 2d 251 (1972). We recently stated in *Lunsford v. McDaniel,* Smith's Advance Sheets, Op. No. 20905, filed 3/6/79, that a motion for summary judgment should only be granted "when it appears from the pleadings, depositions, and affidavits that there is no genuine issue of material fact." Here, the affidavit and deposition of appellant Hamlin place the construction of the 1961 instrument in direct controversy. Therefore, summary judgment was premature and improper.

I would remand.

Appendix B: Rule 44 of the Rules of Practice of the Circuit Courts for South Carolina. Rule for summary judgment

(a) A party seeking to recover upon a claim, counterclaim, cross claim or to obtain a declaratory judgment may, at any time after the expiration of twenty days from the commencement of the action, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof; notice of motion shall state the grounds for the motion.

(b) A party against whom a claim, counterclaim, or cross claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof; notice of motion shall state the grounds for the motion.

(c) The motion for summary judgment shall be served at least ten days before the time fixed for the hearing. The adverse party, prior to the day of hearing, may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings and depositions, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Supporting and opposing affidavits shall be made on personal knowledge, or, if on information and belief shall state the sources of such, shall set forth only such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for

trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(e) Whenever it appears necessary to the Court, it may order a continuance to permit affidavits to be obtained or depositions to be taken, or make such other Order as is just. Any depositions taken may be opened by the Court and considered relative to a motion under this Rule.

(f) Should it appear to the satisfaction of the Court at any time that any of the affidavits presented pursuant to this Rule are presented in bad faith or solely for the purpose of delay, the Court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Supreme Court, U. S.
FILED
DEC 26 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-781

OSGOOD D. HAMLIN, Petitioner,

versus

F. GREGORIE & SON, ESTHER GREGORIE, MARY ALLSTON GREGORIE, SARAH GREGORIE MILLER, FERDINAND GREGORIE, JR., ELIZABETH GREGORIE PENNERWILL, ANN GREGORIE GREENE, JULIAN WEAVER GRAY, ESTHER ROYALL GRAY SWAIN, SARAH WINDON GRAY MILLS, and JOHN EVERETT GRAY, Respondents.

Supplemental Appendix
~~PETITION FOR REHEARING IN THE COURT BELOW~~

FRED G. SCOTT, JR.
Post Office Box 70025
North Charleston, S.C.
29405

Attorney for the
Petitioner

Of Counsel:
JACK WHITE
129 Meeting Street
Charleston, S. C. 29401

INDEX

Page

Statement..... 1

Appendix:

C. Petition for Rehearing....A-23

Constitutional Question Raised..A-34

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-781

OSGOOD D. HAMLIN, Petitioner,

versus

F. GREGORIE & SON, ESTHER GREGORIE, MARY ALLSTON GREGORIE, SARAH GREGORIE MILLER, FERDINAND GREGORIE, JR., ELIZABETH GREGORIE PENNERWILL, ANN GREGORIE GREENE, JULIAN WEAVER GRAY, ESTHER ROYALL GRAY SWAIN, SARAH WINDON GRAY MILLS, and JOHN EVERETT GRAY, Respondents.

PETITION FOR REHEARING IN THE COURT BELOW

STATEMENT

Petitioner was served Respondents' Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of South Carolina on December 13, 1979. By error this brief contained as Appendix I a copy alleged to be Petitioner's Petition for Rehearing to the Supreme Court of South Carolina which

does not raise a question under the Constitution of the United States.

For the purpose of correcting this error Petitioner submits a copy of the filed Petition for Rehearing, denied by the South Carolina Supreme Court, which is the Petition relied upon by Petitioner. This Petition is labeled as if it were Appendix "C" to the original Petition for Writ of Certiorari.

The Constitutional question, deprivation of property without due process of law, is raised on Page A-34, infra, in Paragraph EIGHTH of the Petition for Rehearing.

APPENDIX

APPENDIX C: Petition for Rehearing

Your Appellant, OSGOOD D. HAMLIN, respectfully petitions this Honorable Court for a stay of remittitur and for a rehearing of this matter as provided under Section 2, Rule 17, of the Rules of this Court. Your Appellant would respectfully show that this Court has overlooked certain misapprehensions and oversights of the Trial Judge, whose Order of Summary Judgment this Court has affirmed, all as hereinafter set forth, all of which raise meritorious grounds for re-consideration by this Honorable Court and the remanding of this matter to the Circuit Court for a full hearing on the merits.

FIRST. The Trial Judge has misapprehended his duty under Rule 44 of the Circuit Court Rules. This rule charges him with sifting the factual averments and reasonable inferences deducible therefrom in a light most favorable to the Appellant Hamlin, seeking therefrom "genuine issue for trial". The averments of record available to the Trial Judge for sifting are limited to the following:

1) Complaint of Respondents.
2) Answer of Appellant Hamlin.
3) Deposition of Appellant Hamlin.
4) Affidavit of Appellant Hamlin.
5) Affidavit of a non-party, Attorney W. H. Brockinton.

The record is void of any support-

ing affidavits of Respondents, and their claims are founded and supported only by their naked petition.

SECOND. The Trial Judge has overlooked the following itemized uncontradicted averments of fact, together with reasonable inferences deducible therefrom, which when considered in a light most favorable to the Appellant, constitute "genuine issue for trial", supporting Appellant's position that the deed of Ferdinand Gregorie to Appellant Hamlin, dated January 31, 1961, and recorded in the R.M.C. Office for Charleston County in Book U-78, Page 66, was a conveyance in fee simple absolute.

1) As regards Deed (TR 31, 32 & 33):
   a) Deed is regular in form.
   b) Deed was prepared by grantor's attorney.
   c) Deed is properly executed.
   d) Valuable consideration is recited.
   e) Deed is witnessed by grantor's daughter and daughter-in-law.
   f) Deed is probated by grantor's attorney.
   g) Dower is renounced by wife of grantor.
   h) Dower renounced before attorney of grantor.
   i) Deed properly recorded.

2) As regards Agreement between F. Gregorie, Jr. and O. D. Hamlin

(TR 19-24):

a) Agreement on its face is an option to purchase conditioned upon fulfillment of certain specific conditions by optionee-Gregorie:
   i) Exercised with five (5) years.
   ii) Payment of $79,000.00.
   iii) Annual payments of $7,900.00.
   iv) Payment of taxes by optionee.
   v) Payment of insurance by optionee.

b) Option expired January 1966 (TR 198) and was never exercised by optionee Gregorie.

3) As regards undisputed allegations by Appellant-Hamlin:
   a) W. H. Brockinton was the only attorney involved in this transaction and prepared all documents and supervised their execution, including deed and option agreement.
   b) At no time did Mr. Brockinton allege to advise Appellant-Hamlin that deed and option agreement he prepared and supervised execution of would in effect constitute a mortgage (TR 198).

c) That purchase consideration of $79,000.00, participation in grantor's business and guarantee of future purchases of grantor's business (an additional $13,000.00) from Arkansas Fuel Oil Company was a full and fair consideration (TR 194).

d) That appellant-Hamlin was a relatively uneducated farmer and grantor-Gregorie was a sophisticated businessman. (TR 194).

e) There was no note or other evidence of any enforceable obligation of Gregorie to Hamlin. That there was no debt of Gregorie to Appellant Hamlin surviving conveyance, therefore, nothing to be secured by the mortgage. (TR 198).

f) That Appellant-Hamlin, at all times, intended the transaction to be an absolute conveyance in fee simple and so relied. (TR 194, 197 and 199).

g) Appellant-Hamlin has paid taxes and insurance on property, has farmed, sold timber, and has sold land without permission of Gregories. (TR 199).

h) Gregorie has never paid any taxes or insurance, disputed Hamlin's right to farm, sell timber or to sell land with-

out Gregorie's permission. (TR 199).

THIRD. The Trial Judge overlooked and misapprehended his duty to sift the averments of record and the reasonable inferences deducible therefrom, in a light most favorable to Appellant Hamlin, for genuine issues of trial, when he ignored averments of Hamlin specifically supporting that intention of the parties was that the deed in question was always intended to be a deed as follows:

1) The consideration of $79,000.00, guarantee of future purchases by Gregorie from Arkansas Fuel Oil Company and participation in the management of the Gregorie business was fair, full and adequate. (TR 194).
2) Intention of parties was conveyance in fee simple absolute. (TR 194, 196, and 199).
3) Negotiations for sale were made with approval of Ferdinand Gregorie and W. H. Brockinton, attorney for Gregorie. (TR 196).
4) Option Agreement was suggested by W. H. Brockinton, attorney for Gregorie, and was nothing more than an option. (TR 196 and 198).
5) There was no debt of Gregorie to Hamlin surviving the conveyance (TR 198).
6) Proceeds from sale of lots would have been applied to purchase by Gregorie, if Gregorie failed had exercised option, but Gregorie failed

to do so, and option expired in 1966. (TR 199).

7) Representations of W. H. Brockinton that Hamlin was not purchasing in fee simple absolute were false. (TR 199).

8) Hamlin has exercised a dominion of a true and lawful owner over the property since his purchase in 1961, paying all taxes, paying all insurance premiums, selling timber, selling land, and farming. (TR 199).

FOURTH. Trial Judge, considering the record at this stage is constituted only of averments, has overlooked the fact that there are no averments in the record by the Respondents, saving and excepting, the initial complaint. Gregorie has failed to affirmatively support Motion for Summary Judgment, either by affirmative affidavits of petitioners or by counter affidavits to Appellant Hamlin. Consequently, any averment by deposition or affidavit of Hamlin contra to allegations of the complaint of Gregorie must be considered, at this state, true and unrefuted. Consequently, there is no averment contra to Hamlin's affidavit and deposition to be relied upon by Judge Moore in the sifting of his facts to determine a genuine issue for trial. Rule 44 provides that an adverse party may not rest upon mere allegations or denial of his pleadings. At this state, it is apparent that it would be necessary for Gregorie to set forth, by affidavit, averments contra to those statements of fact by Hamlin which esta-

blished "genuine issue for trial". Affidavit of W. H. Brockinton, the only extra-pleading allegations in favor of Gregorie, is ambiguous and hedges by Brockinton's failure to set forth direct statements as to the nature of the transaction as follows:

1) Even though Brockinton prepared all documents, supervised this transaction from negotiation through execution, Brockinton states, "there was still no question, but that the property known as "OAKLAND" was simply being put in Hamlin's name as security for the monies being borrowed to pay off the indebtedness to Arkansas Fule". Yet, there is the glaring omission by Brockinton of any averment that the deed was intended to be a mortgage. Nor is there any statement that there was a note prepared or other evidence of an obligation by Gregorie to repay Hamlin. Brockinton vaguely speaks of an understanding of a security, yet admits preparing documents and supervising transaction with no documentary substantiation. (TR 191).

2) Although Brockinton states, "there was certainly never any understanding on deponent's part that "OAKLAND" was being sold to Hamlin, or that he was purchasing said property from the Gregorie family", the affidavit of

Brockinton is dramatically void of any reference to documents that would support this position, either official documents executed by parties, or notes, memoranda and correspondence in the files of Brockinton. Such averment must be suspect when Brockinton, himself, prepared the deed and acted as notary for the probate and the renunciation of dower. (TR 191).

3) Hamlin, by his affidavit, responds to all averments of Brockinton that might infer the deed in question was a mortgage, specifically denying the same and affirmatively avering the deed was originally intended to be, and always was, a deed. (TR 197 & 199).

FIFTH. The Court has overlooked that the Trial Judge has misapprehended that his duty, under Rule 44, is to be a weigher of the facts, rather than one of sifting the averments of record and reasonable inferences deducible therefrom, in a light most favorable to the Appellant. The Trial Judge has wrongfully acted as a judge of the facts in the following instances:

1) His Honor, at this state of proceeding, does not have the authority to find that the deed and the Memorandum of Agreement are part and parcel of the same

transaction. (TR 204).

2) His Honor, at this stage of proceeding, does not have the authority to conclude the existence of a debt surviving the conveyance when there is no showing of evidence of an enforceable debt, and where the direct unequivocal statement of Appellant, by affidavit, is that there was no surviving debt. (TR 206 & 207).

3) His Honor, at this stage of proceeding, does not have the authority to find no discussion between parties personally as to sale when there is direct averment by affidavit of Hamlin of negotiation between Hamlin, attorney for Gregorie, creditor for Gregorie, and approval by Gregorie as to sales negotiations. (TR 196).

4) His Honor, at this stage of proceeding, does not have the authority to find that the purchase consideration was grossly inadequate, where there is no direct testimony at all to support that finding. The only testimony as to value of the property is by Appellant Hamlin who avers that the consideration of $79,000.00, guarantee of future purchases, and participation in management of the Gregorie business is full and fair.

(TR 206).

5) His Honor, at this stage of proceeding, does not have the authority to read terms of the option agreement in any way but as literally stated. The plain and literal meaning of the option agreement is that the grantor, Gregorie, had the option to purchase "OAKLAND" from the grantor, Hamlin, by fulfilling certain specific terms. (TR 206).

SIXTH. The Court has overlooked that the Trial Judge has overlooked and misapprehended the ruling law that a deed, regular in form, will not be found to be a mortgage, unless it is proven by clear, definite and convincing evidence that the original intention of the parties was that it be a mortgage. At this stage of the legal process, i.e., consideration of summary judgment, there is no evidence, only allegations and averments of fact. The only relevant averment of the Plaintiffs, whose burden it is to show by clear, definite and convincing evidence that the deed in question was originally intended to be a mortgage, is to be found in Paragraph EIGHTH of the complaint and reads as follows:

> "The plaintiffs are informed and believe that on January 31, 1961, Ferdinand Gregorie and Osgood D. Hamlin, both clearly intended that the instrument

> dated January 31, 1961, conveying property known as "OAKLAND" from Ferdinand Gregorie to Osgood D. Hamlin, was in fact a mortgage instrument or an instrument intended to secure Osgood D. Hamlin for the repayment to him of the debts of Ferdinand Gregorie." (TR 5).

Ferdinand Gregorie died in 1968, and the record is void of any cooperating allegation by Ferdinand Gregorie made prior to his death. The other party to the deed, Appellant Hamlin, specifically denies in his answer this allegation of Gregorie. (TR 15). Hamlin further, by affidavit, clearly and equivocally avers as follows:

> "It was the intention of deponent (Hamlin) at all times, that this consideration was for the conveyance to deponent (Hamlin) by Ferdinand Gregorie of "OAKLAND", in fee simple absolute. Furthermore, it was always the expressed intention of Ferdinand Gregorie, his son Ferdinand Gregorie, Jr., acting as his agent, and his attorney W. H. Brockinton, that this conveyance was in fee simple absolute, and on information and belief, such was the actual intention of Ferdinand Gregorie, Ferdinand Gregorie, Jr., and W. H. Brockinton, all on which deponent relied." (TR 194)

and

> "Deponent advised W. H. Brockinton and Ferd Gregorie that if Gregorie desired, he (Hamlin) would purchase "OAKLAND" for an amount agreed upon, pay debt to Arkansas Fuel Oil Company, participate in operation of the business, and finance the business. W. H. Brockinton, attorney for the Gregories, asked Hamlin if he would enter into an option agreement with Ferd Gregorie, whereby deponent would sell to Ferd Gregorie "OAKLAND", if exercised in one (1) year. Later it was requested the option period be extended for five (5) years. This was agreeable to deponent (Hamlin) and to Ferdinand Gregorie." (TR 196).

and

> "At all times, it was made clear by deponent (Hamlin) that the purchase of "OAKLAND" was to be absolute. This was particularly made clear to W. H. Brockinton, attorney for the Gregories, and to Ferd Gregorie." (TR 197).

These averments of Hamlin raise a "genuine issue of fact" which pre-empt

summary judgment and raise Hamlin's right to trial.

SEVENTH. The Court has overlooked the fact that affirmation of the Order of the Trial Judge deprives the parties hereto, and any other persons similarly situate, of the right to freedom of contract, effectively ruling that any agreement granting an option to a grantor to repurchase property, conveyed at the time of conveyance, is by law a mortgage, and consequently, no agreement between a grantor and a grantee providing for a future repurchase option by grantee to the grantor can be relied upon to be legal in the State of South Carolina, whether said transaction might be entered into now or eighteen (18) years ago.

EIGHTH. The Court has overlooked the fact that the Trial Judge has misapprehended his duty, ruling on a Motion for Summary Judgment and establishing himself as a "Trier of Fact", where the actual facts alleged by the Appellant Hamlin and the reasonable inferences deducible therefrom in a light most favorable to said Appellant, raise a "genuine issue of fact" to be determined by trial. The Trial Judge has, in effect, weighed the facts contrary to his authority and contrary to Hamlin's right to due process and equal protection of law. Affirmation of the Order of the Trial Judge effectively deprives Appellant Hamlin of his property without due process of law and without equal protection of the law as guaranteed to Hamlin

under the Constitutions of the State of South Carolina and the United States of America.

WHEREFORE, having shown that the record when sifted, yields averments and reasonable inferences deducible therefrom, which if supported by competent evidence at trial, raise "genuine issues for trial", your Petitioner prays that remittitur be stayed and that directive of this Court of July 24, 1979 be withdrawn and this matter be remanded for trial.

Respectfully submitted,

Jack White, Esquire
Fred G. Scott, Jr., Esquire
Lewis, Lewis & Robinson

Attorneys for Appellant

By: s/Fred G. Scott, Jr.

August 3, 1979.

CERTIFICATE OF COUNSEL

The undersigned attorney at law certifies that he is not concerned in this matter and that there is merit in the grounds set forth in this Petition for Rehearing.

s/George E. Campsen

August 3, 1979.

Supreme Court, U. S.
FILED
DEC 14 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79--781

OSGOOD D. HAMLIN, Petitioner,

versus

F. GREGORIE & SON, ESTHER GREGORIE, MARY ALLSTON GREGORIE, SARAH GREGORIE MILLER, FERDINAND GREGORIE, JR., ELIZABETH GREGORIE PENNERWILL, ANN GREGORIE GREENE, JULIAN WEAVER GRAY, ESTHER ROYALL GRAY SWAIN, SARAH WINDON GRAY MILLS, and JOHN EVERETT GRAY, Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

W. PAUL CANTRELL, JR.
Post Office Box 152
Charleston, S. C. 29402

Attorney for Respondents.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	7
Statement of the Case	7
Argument	8
Conclusion	15

Appendix:

I. Petitioner's Petition for Rehearing A-1

TABLE OF CITATIONS

Cases

	Page
Ayers, Lawrence H. v. Past-time Amusement Company, 283 F.Sup. 773 (1968)	14
Bonner v. Gorman, 213 U.S. 86 (1909)	3
Brinkerhoff-Farris Trust & Savings Company v. Hill, 281 U.S. 673 (1930)	4, 5, 14
Louisville & N. R. Co. v. Schmidt, 177 U.S. 236	11
Twining v. New Jersey, 211 U.S. 78 (1908)	9, 10, 13
Zoby v. American Fidelity Co., 242 F.2d 76 (4th Cir. 1957)	14

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79--

OSGOOD D. HAMLIN, Petitioner,

versus

F. GREGORIE & SON, ESTHER GREGORIE, MARY ALLSTON GREGORIE, SARAH GREGORIE MILLER, FERDINAND GREGORIE, JR., ELIZABETH GREGORIE PENNERWILL, ANN GREGORIE GREENE, JULIAN WEAVER GRAY, ESTHER ROYALL GRAY SWAIN, SARAH WINDON GRAY MILLS, and JOHN EVERETT GRAY, Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

OPINIONS BELOW

The opinion of the Supreme Court of South Carolina is not as yet officially reported, but is appended to the Petition for a Writ of Certiorari. The opinion was delivered on July 24, 1979, Opinion No. 21009, Petition for Rehearing denied on October 16, 1979. Petition for Rehearing is appended to Respondents' Brief. [Appendix I]

JURISDICTION

The Petition for Certiorari is not within the jurisdiction of the United States Supreme Court for the following reasons:

(1) PETITION DOES NOT CONFORM TO U. S. CODE.

The Petition is not taken in conformity to 28 U.S.C. 1257(3), which states as follows:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court as follows:
>
> * * *
>
> 'By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State Statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right or privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.' June 25, 1948, C. 646, 62 Stat. 292.
>
> * * *"

The Petition simply does not call into play any state statute, directly or through Judicial interpretation, as being repugnant to the United States Constitution. Nor is any right "claimed under the Constitution" a right guaranteed by the Fourteenth Amendment to the United States Constitution. Further, no such right, in any event, was abridged.

(2) NO FEDERAL QUESTION

As will be reflected in the ARGUMENT section, infra, no federal question exists in this case, and none such was necessary to the judgment, or in fact was made the ground for it. Nor did the record show on what ground the decision of the matter in which the federal question is alleged to have been involved was made. Bonner v. Gorman, 213 U.S. 86 (1909).

Respondents assume that Petitioner contends that South Carolina Summary Judgment Rule was unconstitutionally applied to deprive Petitioner of a protected right.

(3) FEDERAL QUESTION NOT TIMELY OR PROPERLY RAISED

The federal question sought to be reviewed, though Respondents continue to assert the non-existence of any federal question, was not timely or properly raised at any stage of the state court proceedings, nor was a federal question ever discussed or passed upon by any

state trial or appellate court.

Petitioner asserts in the Petition for Certiorari itself the following statements:

> "The Petitioner timely petitioned for hearing and raised the constitutional question that affirmation of the Order of the lower court deprived the Petitioner of his property without due process of law. This was the first opportunity to raise this issue, as the affirmation by the Supreme Court of South Carolina of the Order of the lower court effectively changed the rule of permissible action to be taken in a summary judgment, Brinkerhoff-Farris Trust & Savings Company v. Hill, 281 U.S. 673 (1930). [Petition for Writ of Certiorari, p. 6][Emphasis Added]
>
> * * *
>
> "The due process claim was raised at the first available opportunity on Petition for Rehearing before the South Carolina Supreme Court." [Petition for Writ of Certiorari, p. 8][Emphasis added.]
>
> * * *

Petitioner unequivocably states that the due process claim was raised

in the Petition for Rehearing. Respondents have appended Petitioner's Petition for Rehearing to Respondents' Brief [Appendix I] for this Court's review. The Petition for Rehearing is totally void of any mention, discussion, inference or claim of any constitutional or federal question. The Petition for Rehearing addresses only two arguments: the first being that the State Supreme Court overlooked the evidence of record as contained in the Transcript of Record; and the second, that the judgment would cause uncertainty for real estate titles in South Carolina. As can be readily seen from the Petition itself, no federal question was mentioned, nor were there circumstances or facts mentioned in which any state court had transgressed the due process clause of the Fourteenth Amendment. Nor is there any room for inference that the denial of the Petition for Rehearing required or even permitted the passing upon a federal question.

In citing Brinkerhoff-Farris Trust & Savings Company v. Hill (supra), the Petitioner failed to distinguish the fact that in the Brinkerhoff-Farris case, the Plaintiff seasonably filed a petition for a rehearing in which it specifically set out the circumstances, facts and manner in which the lower court had transgressed the due process clause of the Fourteenth Amendment. Brinkerhoff-Farris Trust & Savings Company, at page 678. [Emphasis Added]

For lack of a better description,

Petitioner has simply misstated the facts in his presentation, wherein he contends that a federal question was raised, the time at which it was raised, and the manner in which it was raised, together with the method of raising it.

The Petitioner did accurately report the manner in which the federal question was passed upon by the court. In his Petition for Certiorari at page 6, Petitioner states:

> "The Supreme Court of South Carolina did not expressly pass on the constitutional issues so raised..." [Petition for Writ of Certiorari, p. 6]

(4) JUDGMENT RESTS ON ADEQUATE NON-FEDERAL GROUNDS

The judgment of the South Carolina Supreme Court rests entirely on adequate non-federal grounds. The only question before the South Carolina Supreme Court was, in fact, whether or not there existed a genuine issue of material fact, which question was answered in the negative against the interest of the Petitioner. None of the justices were in the slightest disagreement as to any federal question [Petitioner's Appendix A, p. A-21].

It is well settled that the United States Supreme Court's power to review decisions of state courts is limited to their decisions on federal questions. [Numerous citations omitted]

QUESTIONS PRESENTED

Petitioner's styling of the question presented for review is so general and vague that your Respondents have difficulty in ascertaining what specific questions of constitutional and/or federal law they are required to answer under the facts of this case. Respondents in a good faith effort to define the question offer the following:

Did the South Carolina Supreme Court in affirming (without oral argument) the trial court's granting of summary judgment against Petitioner deny Petitioner of a constitutionally protected right?

STATEMENT OF THE CASE

Petitioner's version of the stated facts is at variance in important respects with the actual finding. Hence, in the interest of brevity and accuracy, Respondents adopt as our Statement of Facts the complete findings of the trial court as sustained by the South Carolina Supreme Court. [Petitioner's Appendix A-2 through A-5] The trial court granted summary judgment for Respondents, declaring the deed in question an equitable mortgage and referred the case to the Master-in-Equity for an accounting. After the accounting is conducted, the trial court is directed to enter judgment for the amount found to be due in favor of the Petitioner. Foreclosure and sale are provided for in the event the Respondents are unable to pay the debt.

ARGUMENT

THE STATE COURT PROCEDURE AT THE TRIAL AND/OR APPELLATE LEVEL DID NOT ABRIDGE ANY OF PETITIONER'S CONSTITUTIONALLY PROTECTED RIGHTS.

Plaintiff contends throughout his Petition that the granting of summary judgment denied him the opportunity to be heard and was, therefore, a fundamental violation of due process of law.

Petitioner alleges that he was not given a "full hearing" or "appropriate hearing" and bases his claim entirely upon this fact. It is somewhat uncertain whether or not he contends that the lack of a hearing at the trial court stage, or the appeal without oral argument to the South Carolina Supreme Court, or the combination of the two hearings constitutes the gravamen of his complaint; but, Respondents attempt to address all three contentions. Petitioner's assertion that he was denied a hearing is initially controverted by the very fact that Petitioner through his counsel appeared at numerous motion hearings including the hearing for summary judgment of which he now complains.

The question, therefore, becomes a question of definition of the concept "full hearing" as claimed by Petitioner to have been denied by the state court and secondly and cumulatively, the question of what constitues procedural due process under the Fourteenth Amendment of the Constitution of the United

States (Petitioner made no reference to the Fifth Amendment of the United States Constitution).

There have been a great number of cases which give guidance in determining the procedural standards for civil and criminal trials in state court proceedings, and also, which give guidelines for determining in general what constitutes procedural due process under the United States Constitution.

The same argument that is being made in the instant case can best be answered by an exact quotation from Twining v. New Jersey, 211 U.S. 78, 111 (1908) as follows:

> "Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction [citations omitted], and that there shall be notice and opportunity for hearing given the parties [citations omitted]. Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has, up to this time, sustained all state laws, statutory or judicially declared, regulating procedure, evidence, and methods of trial, and held them to be consistent with due process of law [Citations omitted].

> Among the most notable of these decisions are those sustaining the denial of jury trial, both in civil and criminal cases ..." Twining v. New Jersey 211, U.S. 78.

The cases proceed upon the theory that, given a court of justice which has jurisdiction, and acts, not arbitrarily, but in conformity with the general law, upon evidence and after inquiry made with notice to the parties effected and opportunity to be heard, then all the requirements of due process, so far as it relates to procedure in court and methods of trial and character and effect of evidence are complied with. Twining, (supra)

Petitioner makes no allegation that the state courts lack jurisdiction or that they acted arbitrarily or for that matter that they did not act in conformity with the general law. Nor is contest made that notice of hearing was withheld or that at least some inquiry was made, or even that evidence was presented. Rather, Petitioner contests the extent of inquiry and the sufficiency of evidence made or presented at the summary judgment hearing in question.

Clearly, Petitioner was given notice and an opportunity to be heard as evidenced by his attendence at the various motion hearings involved. With regard to the summary judgment hearing, it is important to note that the notice for summary judgment was filed on Febru-

ary 2, 1978, and that the hearing for same was held on June 12, 1978; more than four months after the initial notification of the motion hearing. The case, itself, had been filed since October 24, 1974, nearly four years prior to the hearing on the motion for summary judgment. [Respondents' state court Appellant Brief, p. 18]

Notice and opportunity for hearing having been given, all of the requirements for procedural due process, so far as it related to procedure in court and methods of trial and character and effective evidence, were complied with.

Additionally, the exhaustive nature of the summary judgment hearing before a circuit court judge and the exhaustive nature of the briefs filed therein by both Petitioner and Respondents, together with the lengthy order eventually rendered by the trial court judge, after nearly four months of consideration, surely meets any reasonable definition of "a full and fair hearing".

Once the procedural due process requirements have been met, this court has made it clear that the Fourteenth Amendment extends no further to determine by what process legal rights may be asserted, or legal obligations enforced in state court. Louisville & N. R. Co. v. Schmidt, 177 U.S. 236.

Petitioner has put forth the somewhat confusing contention in his Petition that his denial of due process

stems also from the refusal of the South Carolina Supreme Court to allow him oral arguments on appeal. Quoting from the Petition for Certiorari at page 9, Petitioner concurs in Respondents' position that no claim has been presented for resolution in the United States Supreme Court, but at the same time, indicates that the State Supreme Court denied him a hearing:

> "In the instant case, however, the South Carolina Supreme Court did not merely affirm an erroneous lower court decision after an appropriate hearing which, it is conceded, would present no claim for resolution in this court [cases omitted] rather, without hearing, the State Supreme Court affirmed an erronous decision, and necessarily decided that a court of original jurisdiction can deny litigants any hearing for the resolution of disputed facts ..." [Emphasis added]

Petitioner is apparently unaware that the scope of argument allowed before the South Carolina Supreme Court on appeal is not altered whether the case is heard on briefs, alone, or is heard with oral argument.

Petitioner's real objection is not so much the existence of the power of the State Supreme Court to affirm the granting of summary judgment by the

circuit court, but rather the Petitioner would contend that it is the fact that when the power is exercised by the State Supreme Court, it is not subject to review, and may be said to be unlimited.

Similar questions have been raised to this court before, and the cases have uniformly held that the power of the state supreme court is limited, but it is limited by the obligation to administer justice. The power to render a final judgment must be lodged somewhere, and in every case a point is reached where litigation must cease. What that point is can be determined by the legislative power of the state, for the right of appeal is not essential to due process of law. Twining v. New Jersey, (supra)

Respondents do not perceive that Petitioner challenges the constitutionality of South Carolina Circuit Court Rule 44; however, Petitioner does make the assertion that South Carolina Circuit Court Rule 44 was changed in the instant case from previous South Carolina court rulings.

Even were this to be the case, which it is not, this fact would give the Petitioner no relief for right or review by the United States Supreme Court.

> "That the mere fact that a State Court has rendered an erroneous decision on a question of state law, or has over-

> ruled principles or doctrines established by a previous decision on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this court." Brinkerhoff-Farris Trust & Savings Company v. Hill (supra, p. 670).

South Carolina Circuit Court Rule 44 was, of course, not changed, and without rearguing the brief submitted in the State Supreme Court, the lower court concluded that no genuine issue of material fact existed and therefore rendered its order. In the Supreme Court, Petitioner made numerous assertions that there were disputed facts and the State Supreme Court, relying on past State and federal law, found that continued assertions that there were disputed facts did not make undisputed facts into disputed facts.

The State Supreme Court relied notably upon Zoby v. American Fidelity Co., 242 F.2d 76 (4th Cir. 1957).

Also relied upon was Lawrence H. Ayers v. Past-time Amusement Company, 283 F.Sup. 773 (1968), wherein the court held that

> "Neither the conclusionary allegations, nor the general denials perputrated by an adverse party make the existence of a disputed fact." (Ayers, supra, p. 775.)

When one examines the bare allegations made by Petitioner throughout the within case, and compares the same to the general law of property in the state it becomes patently clear that there is no controversy, and that the trial judge correctly applied the law to the facts in his granting of summary judgment.

CONCLUSION

In reading the State Court's opinion and then comparing Petitioner's averments, it becomes clear that the reasons for the Petition are fictitious and frivilous, and that the Petitioner is merely requesting this court to second-guess the South Carolina Supreme Court on the merits of a case which was decided totally on non-federal grounds.

Respondents therefore respectfully requests that the Petition for Certiorari be denied and that this court do award its damages pursuant to Rule 56(4) of the rules of this court, if Petition for Writ of Certiorari be denied, upon the ground that it is manifest that there is no ground for granting such a writ and that the Petitioner proceeded in an effort to delay further this case.

Respectfully submitted,

W. PAUL CANTRELL, JR.
Post Office Box 152
Charleston, S. C. 29402

Attorney for Respondents.

APPENDIX

APPENDIX

APPENDIX I: Petition for Rehearing

The appellant, Osgood D. Hamlin, respectfully petitions the Court for a rehearing of the appeal in this case, on the following grounds:

I.

The lower court granted summary judgment to the respondents herein, on the ground that the pretrial record of this case fails to disclose a genuine issue of fact on the central issue of the case, namely, whether the parties to the 1961 transaction at issue intended to effect an absolute conveyance, accompanied by a repurchase option; or whether they intended to create a mortgage.

The appellant herein submits that the Court has overlooked the evidence of record as contained in the Transcript of Record, which points to the existence of genuine issues of fact upon virtually every point considered to be free of conflict by the lower court. Among these parts of the record which create genuine issues of fact where the lower court found none, are the following:

a. The lower court held (Tr. 204) that Mr. Gregorie had the option of saving his business by borrowing money on the security of Oakland Plantation, whereas the evidence of Mr. Gregorie's attorney was that Mr. Gregorie was unable to borrow anything. (Tr. 34.)

b. The lower court found that, without dispute, a debt survived the conveyance, whereas the evidence shows a flat denial by the appellant that any such obligation survived said conveyance. (Tr. 198.)

c. The lower court held that, without dispute, there was no evidence that the appellant desired to purchase the plantation, whereas the uncontradicted evidence from the appellant himself is that he did wish to make the purchase. (Tr. 196.)

d. The lower court held that, without dispute, the purchase price was inadequate, whereas the only evidence of the plantation's worth, in 1961, was from the appellant himself, who testified that it was worth no more than he paid for it, the respondents having offered no direct evidence whatever as to its value at that time.

e. The lower court held that, without dispute, this transaction originated in a request by Gregorie for a loan from appellant, whereas there is no evidence whatever in this pretrial record that such was the case. The only evidence of what Gregorie requested of the appellant was that such request was for a one-year, and then a five-year, option.

f. The lower court wholly disregarded the plain terms of the option contract, which declared that said contract contained and stated the entire agreement of the parties, said contract having been drafted, not by appellant's attorney but rather by the attorney of the vendor, Gregorie.

g. The lower court disregarded the evidence that the parties entered into two transactions at about the same time, one being a sale with option to repurchase, and the other being a regular mortgage. This was evidence overlooked by the lower court, that the vendor well knew the distinction between the two.

h. The lower court overlooked the evidence that the appellant has paid the taxes on the property, this circumstance pointing to ownership, and not security.

II.

Appellant submits to the Court that the granting of summary judgment, in the face of the documentation which accompanied this transaction, will have an unlooked for and undesirable impact upon the status and security of real estate titles in South Carolina. On the one hand, conveyancers have always known that a deed, with or without a contemporaneous option to repurchase, may

later be challenged and asserted to be a mere mortgage. However, the unequivocal declaration of the parties, that the entire agreement between them is correctly expressed in the deed and option to repurchase, should be, at the very least, a circumstance pointing to the inference that an absolute conveyance, and not a mere mortgage, was the intent of the parties in such a situation. The lower court's decision in the instance case casts doubt upon whether the grantee even has the right to contest, by his own assertions of intention and by pointing to the circumstances of the transaction, that a true sale with option was intended. If the lower court's opinion is to be reported, then the conveyancing Bar must henceforth assume that every conveyance accompanied by an option to repurchase is a mortgage, and that no accompanying documentation will be permitted to show otherwise. Appellant submits that the impact upon titles, and especially commercial titles, would be substantial and untoward.

III.

Appellant submits that the lower court revealed its misconception of its function under Rule 44 when the Court stated: "I must search for the intention of the parties at the time of the transaction and not as any of them may interpret their intentions at this time." (Tr. 204.) Undeniably, it was not the proper function of the lower court, pursuant to a motion for summary judgment, to "search for the intention

of the parties." It was the sole function of the lower court to discern whether there was any genuine issue of fact as to what that intention was. Instead, the lower court proceeded to make factual findings upon said intention, as by way of trial of the case.

Respectfully submitted,

Jack White
Post Office Box 629
Charleston, South Carolina 29402

Fred G. Scott, Jr.
Post Office Box 7523
Charleston, South Carolina 29405

Lewis, Lewis & Robinson
Post Office Box 11716
Columbia, South Carolina 29211

s/ Daniel S. Lewis

Columbia, South Carolina

August 3, 1979.

CERTIFICATE OF COUNSEL

I Robert E. Kneece, hereby certify the following:

I am an attorney duly admitted to practice before the South Carolina

Supreme Court and other courts and am actively engaged in the practice of law in Columbia, South Carolina.

At the request of counsel for the Appellant, Osgood D. Hanlin, in the case of F. Gregorie & Son, et al, v. Hanlin (Opinion No. 21009, filed July 24, 1979), I have carefully examined the transcript of record, the briefs and arguments of the parties, and the petition for a rehearing, and I have further discussed this matter with counsel for the Appellant with a view of ascertaining whether, and in what respects, I can give the certificate required under Rule 17 of this Court. Based upon the foregoing, and further based upon my best judgment, it is my professional opinion that there is merit in the grounds of the petition for rehearing, and that a rehearing thereon would be desirable.

I am not concerned in the case.

s/ Robert E. Kneece
Robert E. Kneece
Attorney at Law

Columbia, South Carolina

August 3, 1979.